(3)

No. 88-1668

In the Supreme Court
OF THE
United States

October Term, 1988

Atlantic Richfield Company,
Petitioner,
v.
USA Petroleum Company,
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Petitioner Atlantic Richfield Company ("ARCO") respectfully submits this reply brief in support of its Petition For Writ Of Certiorari (the "Petition").

Respondent's Brief In Opposition ("Opp.") readily acknowledges the direct conflict between the Ninth Circuit decision in this case and the decisions of the Seventh Circuit on the antitrust injury issue presented here. (Opp. 6, 10-14 (conceding the "fundamentally different approach to the antitrust injury analysis" in maximum vertical price-fixing cases)).

The Brief in Opposition offers two purported reasons why this Court nonetheless should refuse to resolve this conflict. It first asserts that this Court should not grant review because the Ninth Circuit decision, unlike the Seventh Circuit decisions, does not conflict with this Court's precedent on this antitrust injury issue. That assertion, even if true, ignores the fact that this conceded, direct inter-circuit conflict presents a compelling case for the Court to resolve an issue as important as that presented here. Moreover, the assertion is based entirely upon Respondent's efforts to confuse the antitrust injury requirements at issue here with the elements of a substantive antitrust violation, which are not at issue here. The Brief in Opposition next asserts that the antitrust injury issue presented here is not ripe, because it depends upon an assumption, not supported by either the record or the findings below, that Respondent's prices are not "predatory." This assertion is totally disingenuous, for the district court did make such a finding, based upon a substantial record. The nonpredatory nature of Respondent's prices is both law of the case and the obvious predicate of the Ninth Circuit decision which ARCO asks this Court to review.

I.

RESPONDENT'S ARGUMENT THAT THE NINTH CIRCUIT PROPERLY APPLIED THIS COURT'S PRECEDENTS IS INCORRECT AND BASED ENTIRELY ON RESPONDENT'S CONFUSION BETWEEN ANTITRUST INJURY AND PER SE ILLEGALITY

This Court first articulated the antitrust injury requirement in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). The Court there held that it was not sufficient for a private antitrust plaintiff to establish only the defendant's violation and its injury causally related thereto. The Court held that the plaintiff also must show that the nature of its injury reflects the anticompetitive effects that make the conduct unlawful. ARCO's Petition demonstrated that Respondent could not satisfy that requirement because, even assuming it could prove injury causally related to vertical maximum price fixing, its alleged injury — lost profits and sales from having had to compete against the lower prices — did not reflect the anticompetitive effects that make vertical maximum price fixing per se unlawful. (Petition, 10-21.)

The Brief in Opposition completely ignores that demonstration and, indeed, largely ignores the antitrust injury requirement. The first section of the argument simply proves the irrelevant proposition that vertical maximum price fixing is per se illegal under this Court's existing decisions.[1] (Opp. 7-8.) The second section begins with the

[1]USA mischaracterizes this Court's decision, *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. ____, 108 S.Ct. 1515, 99 L. Ed. 2d 808 (1988), in stating that the Court there "reaffirmed" per se treatment of vertical maximum price fixing. (Opp. 6 n.7 and 12.) In *Sharp*, the Court cited *Albrecht v. Herald Co.*, 390 U.S. 145 (1968),

assertion that "[t]he Ninth Circuit followed 50 years of Supreme Court precedent in holding that a horizontal competitor can establish antitrust injury from ARCO's admitted vertical conspiracy to fix below-market prices." (Opp. 9.) That assertion is obviously incorrect and reveals the fundamental confusion running throughout the Brief in Opposition, because the antitrust injury requirement is only twelve years old. Moreover, the assertion is incorrect even assuming the reference is to this Court's precedents on the per se illegality of vertical maximum price fixing. Those precedents do not support the Ninth Circuit decision because, as demonstrated in the Petition at 14-20, they are based on the anticompetitive effects on the defendants' coerced dealers, and not on any effects on the horizontal competitors of those dealers. This Court has never identified anticompetitive effects on competitors as a reason for holding vertical maximum price fixing per se unlawful.[2]

not to address *Albrecht*'s analysis of the per se status of vertical maximum price fixing but to distinguish the case before it from *Albrecht* on the ground that the latter involved an agreement to "adhere to the specified price." 99 L. Ed. 2d at 823-24. In any case, ARCO's Petition does not require the Court to address the issue of the per se illegality of vertical maximum price fixing. (Petition, 15 n.5.)

[2]Respondent cites *Sharp, supra*, 99 L. Ed. 2d at 817, and *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 341-42 (1987), as condemning vertical price fixing on the ground that it may facilitate horizontal cartelization. (Opp. 13-14.) Both *Sharp* and *Duffy*, however, involved the setting of *minimum* prices. It is difficult to envision an industry cartel acting in concert to lower the prices its members charged or to set maximum prices. Moreover, no such cartelization is alleged here.

Respondent also contends that vertical maximum price fixing might produce an anticompetitive effect by discouraging individual dealers from non-price competition through offering superior service or by erecting barriers to entry by new competitors. (Opp. 8.) The

In any event, this Court's precedents on Sherman Act § 1 do not control the different antitrust injury issue presented by Clayton Act § 4. *Brunswick*, 429 U.S. at 488-89; *see Indiana Grocery, Inc. v. Super Valu Stores, Inc.*, 864 F.2d 1409, 1419 (7th Cir. 1989) ("While sections 1 and 2 of the Sherman Act focus on competitive conditions in the market as a whole . . . section 4 of the Clayton Act focuses on the *type* of injury claimed by a *particular* plaintiff and demands that it be an 'antitrust injury' "). Respondent also incorrectly characterizes *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 584 n.8 (1986), as holding that a plaintiff's losses from competing against prices fixed by its rivals that are "below the level necessary to sell" their products always amount to antitrust injury. (Opp. 9; *see id.* 14-15.) The cited language, however, addressed only the threshold cause-in-fact requirement for an antitrust cause of action and not the antitrust injury requirement of *Brunswick*.[3]

The Brief in Opposition's third argument attacks the Seventh Circuit for improperly "impos[ing] a Section 2 element" — *i.e.*, predatory pricing — in a Sherman Act § 1 case. (Opp. 10-14.) This argument again confuses

Court, however, has not identified any such effects as a reason for making vertical maximum price fixing unlawful.

[3]In *Matsushita*, the Court was faced with alleged conspiracies intended to "set maximum prices above market levels, or . . . set minimum prices at *any* level." 475 U.S. at 583-85 n.8. In the footnote cited by Respondent, the Court held that conspiracies of this kind do not subject a competitor to any actual injury sufficient to satisfy the cause-in-fact element of an antitrust cause of action. *Id.* In stating that an antitrust plaintiff has "not suffered an antitrust injury unless" the prices against which it competes were set at below market levels, the Court merely indicated that such below-market pricing is *necessary* to state an antitrust cause of action, not that it is sufficient to do so. *Id.*

antitrust injury with the substantive elements of a Sherman Act offense. The Seventh Circuit did not hold that vertical maximum price fixing was unlawful only where the fixed prices were predatory. Rather, it held that a *competitor* suffers antitrust injury and therefore can bring a claim under Clayton Act § 4 only where its injury results from predatory prices.[4] *See Indiana Grocery*, 864 F.2d at 1416-1420. Only where the fixed maximum prices are predatory as this Court has defined the term — *i.e.*, prices that can pose a real threat of " 'monopoly power for long enough both to recoup the predator's losses and to harvest some additional gain,' " — will the injury to the competitor plaintiff coincide with an injury to consumers. *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 118, 121 n.17 (1986), *quoting Matsushita*, 475 U.S. at 589.

II.

THE RULING BELOW IS RIPE FOR THIS COURT'S REVIEW

The Brief in Opposition alternatively argues that the Court should not review the Ninth Circuit decision on the ground that it presents a purported "predatory pricing"

[4]Respondent incorrectly asserts that the Seventh Circuit rule would deny a "coerced dealer" recovery of losses suffered from its supplier's vertical maximum price fixing. (Opp. 9.) The Seventh Circuit's *Jack Walters* decision makes clear that the plaintiff's losses found not to be antitrust injury were those flowing from its competition with other dealers who complied with the supplier's vertical maximum price fixing, not those from the plaintiff's own compliance with such price fixing. *Jack Walters & Sons Corp. v. Morton Building, Inc.*, 737 F.2d 698, 709, *cert. denied*, 469 U.S. 1018 (1984) ("the only harm to Walters [the plaintiff] came from the fact that competing dealers (or Morton [the defendant] itself) would lower their prices to consumers if Walters did not"). *See Indiana Grocery*, 864 F.2d at 1418 (construing *Jack Walters* to this effect).

question that is "not ripe for review by this Court." (Opp. 14-15.) The predatory pricing question is assertedly not "ripe" because there is neither a factual record nor a finding in the district court establishing that the prices at competing ARCO-brand stations were nonpredatory. These contentions, however, misstate the proceedings below. Even more fundamentally, the purported issue of whether the challenged prices are predatory was not raised on appeal.

The majority and dissenting opinions in the Ninth Circuit most clearly belie Respondent's attempt to manufacture an issue that was not presented on appeal and therefore is not presented here. The majority opinion stated that the "question on appeal is whether *in the absence of proof of predatory pricing* a competitor can recover damages because of a maximum resale price maintenance agreement." 859 F.2d at 689 (Petition, 3a) (emphasis added). The dissenting opinion stated the issue as "whether a retail competitor suffers antitrust injury in the form of lost profits as a result of a *non-predatory* maximum vertical price fixing agreement." 859 F.2d at 698 (Petition, 25a) (emphasis added). These Ninth Circuit opinions could assume, as this Court also can assume, that the challenged prices were not predatory because the district court had so found and Respondent had not challenged that finding on appeal.

The Brief in Opposition asserts that "ARCO did not move for summary judgment below on the ground that it fixed prices that were not 'predatory.'" (Opp. 14.) That assertion is wrong. ARCO rested its summary judgment motion squarely upon the proposition that USA's injury from the prices of ARCO-brand sellers could "constitute[] 'antitrust injury' for Clayton Act purposes only if those prices are 'predatory'" in that they "create[] the

dangerous probability that the defendant(s) may achieve a monopoly with the concomitant ability to raise prices in the future." Memorandum In Support Of Motion For A Pretrial Order, etc., at 10, 16-18 (CR 83). To establish that the prices in question could not be predatory, ARCO submitted a substantial and undisputed factual record showing the absence of any conceivable danger that ARCO-brand sellers could obtain monopoly power in the gasoline market that might enable them later to raise prices to supracompetitive levels and thereby to recoup their losses during the period of alleged predation. *Id.* at 16-18 (CR 83); *see* Declarations And Appendices, etc. (CR 80). Respondent elected not to challenge that showing. It instead contended that the issue whether the prices were predatory was irrelevant, because vertical maximum price fixing is per se illegal.[5]

The district court, in granting summary judgment, made an explicit finding that the ARCO-brand prices at issue were not predatory. First, the court established pursuant to Fed. R. Civ. Proc. 56(d) the undisputed facts submitted by ARCO showing the absence of threatened monopolization. February 17, 1987 Order (Petition, App. B), ¶¶ 1-4 (CR 100). Then, ruling that USA could not establish antitrust injury "without showing such [vertically-imposed maximum] prices to be predatory," it further found: "[u]nder the circumstances here concerned . . . no such showing can be made." *Id.*, ¶ 5.

USA did not challenge this finding on appeal. The dissenting opinion expressly acknowledged this fact, stating: "[t]he district court found ARCO's prices were not predatory, and USA does not challenge this finding on

[5] *See, e.g.,* Plaintiff's Statement of Genuine Issues, etc., ¶¶ 1-3 (CR 88).

appeal."[6] 859 F.2d at 703 (footnote omitted). The majority opinion similarly recognized this fact in its statement of the question on appeal. (*See* pp. 6-7 above.)

Under a long line of Ninth Circuit authority, Respondent's failure to challenge on appeal the district court's finding serves to establish that finding as law of the case and to foreclose any future proceedings on this issue. *Munoz v. County of Imperial,* 667 F.2d 811, 817 (9th Cir.), *cert. denied,* 459 U.S. 825 (1982); *Penn International Industries v. Pennington Corp.,* 583 F.2d 1078, 1082 (9th Cir. 1978); *Calhoun v. Bernard,* 359 F.2d 400, 401 (9th Cir. 1966). This is true notwithstanding the Ninth Circuit's reversal on other grounds of the judgment of dismissal entered on the basis of the district court's summary judgment order. *E.g., Munoz,* 667 F.2d at 817. Respondent's contention (Opp. 15) that it could prove predatory pricing on remand is simply wrong.

Respondent is also wrong in contending that the Petition would require the Court to determine the circumstances in which pricing by a dominant firm or a conspiracy encompassing a large share of the market should be condemned as "predatory" for purposes of imposing substantive antitrust liability, an issue that the Court has reserved in prior cases.[7] The antitrust injury

[6]Respondent unfairly accuses Judge Alarcon of "misstat[ing] the record" in making this statement in his dissent. (Opp. 5 n.5.) However, Respondent cites to no part of the record that would refute the statement.

[7]Opp. 7. Respondent there complains that there is no factual record as to "the level of ARCO's fixed prices, their relationship to cost, the disciplining effect of the fixed prices," etc. None of those factors, however, is relevant where, as the district court found here, the party charging the prices cannot obtain the monopoly power necessary to charge supracompetitive prices in the future.

issue decided here involved only the threshold question of whether fixed prices can be predatory for antitrust injury purposes when there is no reasonable probability that they will create an anticompetitive market structure that could result in future noncompetitive pricing injurious to consumers. Only prices that are "predatory" in this sense can be " 'inimical to the purposes of [the antitrust] laws,' [citing *Brunswick*], and . . . capable of inflicting antitrust injury." *Cargill,* 479 U.S. 118 (footnote omitted). The district court's finding and the factual record below more than amply establish the absence of such predatory prices here. Petition, 5 (describing this record). *See, e.g., Cargill,* 479 U.S. at 119 n.15 ("Excel's 21% market share after the merger suggests it would lack sufficient market power to engage in predatory pricing").[8]

[8]Respondent's claim that "[p]redation is defined solely by the level of price" (Opp. 11 n.11) is clearly incorrect. This Court, in the language quoted above from *Cargill* and elsewhere, as well as the Ninth Circuit, has held that predatory pricing occurs only "when a company that controls a substantial market share lowers its prices to drive out competition so that it can charge monopoly prices, and reap monopoly profits, at a later time." *Transamerica Computer Co. v. IBM,* 698 F.2d 1377, 1384 (9th Cir.), *cert. denied,* 464 U.S. 955 (1983).

CONCLUSION

For the reasons stated above and in ARCO's Petition, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Ninth Circuit.

May 15, 1989.

Respectfully submitted,

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I am a citizen of the United States and a resident of or employed in the City of Los Angeles, County of Los Angeles; I am over the age of 18 years and not a party to the within action; my business address is 1706 Maple Avenue, Los Angeles, CA 90015.

On May 17, 1989, I served the within Reply Brief in support of Petition for Writ of Certiorari, Atlantic Richfield Company vs. USA Petroleum Company, United States Supreme Court October Term 1988, No. 88-1668, on all parties interested in said action, by placing three true copies thereof enclosed in a sealed envelope, with postage thereon fully prepaid, in the United States Post Office mail box at Los Angeles, California, addressed as follows:

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All parties required to be served have been served.

I declare under penalty of perjury, that the foregoing is true and correct.

Executed on May 17, 1989, at Los Angeles, California.

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